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No. 96-959

In The

Supreme Court of the United States

October Term, 1996

THE STATE OF TEXAS,

Petitioner,

v.

KENNETH RAY CLARK,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Pursuant to SUP. CT. R. 15.8, the State of Texas, Petitioner herein,[1] by and through Tim Curry, the Criminal District Attorney of Tarrant County, Texas, files this supplemental brief praying that in addition to the other relief requested, the Court consider a remand of this case in light of its recent decision in *Greene v. Georgia*, 117 S. Ct. 578, 579 (1996).

I. *Greene* provides additional support for the State's argument that the Texas Court of Criminal Appeals' approach to jury death qualification issues is inconsistent with *Sixth Amendment* principles and the *Witt/Adams* substantial impairment test

Greene reiterates that the substantial impairment test of *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)) is the controlling authority as to the death qualification of prospective jurors. *See Greene*, 117 S. Ct. at 578-79. Thus, *Greene* supports the central thesis of the State's Petition for Writ of Certiorari, which is that the Texas Court of Criminal Appeals' "critical inquiry" is an improper corruption of the *Witt/Adams* substantial impairment test. *Compare Adams*, 448 U.S. at 49-51 (when considering the issue of substantial impairment, prospective juror's views on death penalty must be *considered as a whole*) *with Clark v.*

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[1] For clarity, the Petitioner is referred to as "State," and the Respondent is referred to as "Clark."

State, 929 S.W.2d 5, 9 (Tex. Crim. App. 1996) (acknowledging that prospective juror suggested she would consciously distort her answers to the punishment issues but then dismissing her response because it came before "critical inquiry").

II. This case should be remanded in light of *Greene* so that the Texas Court of Criminal Appeals may decide whether the *Witt* due deference rule should be the standard on direct appeal

In the alternative, the Court should remand this case in light of *Greene* so that the Texas high court may consider whether it chooses to adopt the *Witt* due deference standard as the appropriate measure for reviewing a trial court's findings on jury selection issues on direct appeal. *Greene* instructs that states are not bound by *Witt*'s due deference standard of review on direct appeal. *See Greene*, 117 S. Ct. at 579. *Greene* makes clear that *Witt*'s due deference standard provides a minimum level of protection when reviewing a trial court's ruling as to the death qualification of prospective jurors on direct appeal. *See Greene*, 117 S. Ct. at 579. At the same time, *Greene* emphasizes that the states are free to afford capital defendants additional protection. *See id.*

Like the Georgia Supreme Court in *Greene*, the Texas Court of Criminal Appeals has expressed the categorical belief that it is bound by *Witt*'s due deference test when reviewing jury selection issues on direct appeal. *See, e.g., Cantu v. State*, 842 S.W.2d 667, 681 (Tex. Crim. App. 1992) (citing *Witt*'s due deference standard as controlling on direct appeal), *cert. denied*, 113 S. Ct. 3046 (1993); *Vuong v.*

State, 830 S.W.2d 929, 943 (Tex. Crim. App.) (citing the *Witt* due deference standard as controlling), *cert. denied*, 506 U.S. 997, 113 S. Ct. 595 (1992); *DeBlanc v. State*, 799 S.W.2d 701, 717 (Tex. Crim. App. 1990) (citing *Witt*'s due deference standard as controlling), *cert. denied*, 501 U.S. 1259, 111 S. Ct. 2912 (1991); *see also Garcia v. State*, 919 S.W.2d 370, 389 (Tex. Crim. App. 1994) ("We have held on several occasions that, 'on appeal, we recognize that great deference must be given to the trial court judge who is in the best position to see and hear the prospective jurors and to evaluate their responses. We will reverse a trial court's ruling on these issues only when the record shows a clear abuse of discretion. . . . ' "). While the Texas Court of Criminal Appeals professes to follow the *Witt* due deference standard of review on direct appeal, cases such as *Clark* are internally inconsistent on this point. *See Clark*, 929 S.W.2d at 9 (holding that record does not support trial court's excusal of prospective juror despite the fact that juror had indicated she would consciously distort her answers to the punishment issues because the responses supporting the trial court's decision came before the capital sentencing procedure was explained or "critical inquiry" made).[2] The Court should remand this case in light of *Greene* so that the Texas high court may consider whether it chooses to adopt the *Witt* due deference test as the appropriate standard of review of a trial court's findings on jury selection issues on direct appeal.

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[2] As the State's petition shows, the Texas Court of Criminal Appeals was mistaken in suggesting that the capital punishment scheme had not been explained prior to the discounted answers. *See* State's Petition for Writ of Certiorari at 4-5.

CONCLUSION

Although the State continues to maintain that the Texas Court of Criminal Appeals has misapprehended both the *Sixth Amendment* guarantee of an *impartial* jury and *Witt*'s basic tenets, a remand in light of *Greene* should be considered, because it is clear that the Texas high court mistakenly believed itself bound on direct appeal by the *Witt* standard of review concerning trial court findings on jury selection issues.

Respectfully submitted,

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